



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 6 OF 2016

SAMUEL GITAU WANJUMBI..... CLAIMANT

VERSUS

**ORIENTAL CONSTRUCTION COMPANY LIMITED.....
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 27th May, 2016)

JUDGMENT

The claimant filed on 15.02.2016 the statement of claim through Muchiri Wa Gathoni & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Damages of Kshs. 537,000.00 being payment in lieu of termination notice Kshs.15,000.00, 12 months' compensation Kshs. 180,000.00, claim under Work Injuries Benefit Act Kshs. 342, 000. 00.
- b. General damages for pain, suffering and loss of amenities.
- c. Costs of the suit plus interest.

The response to the claim was filed on 02.03.2016 through Wanjama & Company Advocates. The respondent prayed that the respondent's suit be dismissed with costs.

There is no dispute that the parties were in employment relationship.

The **1st issue** for determination is whether the claimant was employment upon casual terms of service. The claimant's testimony is that the respondent employed him from August 2013 to June 2014. He was paid on weekly basis at the rate of Kshs.500.00 per day. RW admitted that the claimant had been the respondent's employee. Whereas the claimant was paid on a daily rate, he worked for more than one month and the job he performed took more than 3 months. RW confirmed that the claimant served for more than 7 months. The service was without a break. The court returns that the claimant's otherwise casual employment converted to employment subject to minimum terms under the Employment Act, 2007 as provided for in section 37 of the Act. The service was not casual and the court returns as much.

The **2nd issue** for determination is whether the claimant was injured in the course of employment and while on duty. The claimant testified that on the date of the accident he was assigned by the foreman called Ochieng to carry some stones. The claimant testified that in the process he was carrying a stone when one of the slabs of stones on the stair case he was walking on broke, the claimant fell, and the claimant's hand got broken. The slabs had not been fixed but it was the only route the claimant was required to use while working in his assigned undertaking of carrying stones. The claimant's case was

that the respondent paid all the resultant medical bills but he was not paid compensation for the injury. RW confirmed that Ochieng was the foreman at the site the claimant was deployed to work, he denied completing the work injury compensation forms and further denied that Ochieng had reported that the claimant had suffered an injury. RW stated that the claimant had come to the office with a bandage sometimes on 14.04.2014 and reported the injury. The court has considered the contradictory account by RW and finds that there is no reason to doubt that the claimant was injured while on duty.

The **3rd issue** for determination is whether the claimant is entitled to compensation under the Work Injury Benefits Act, 2007 as prayed for. Section 16 on substitution of compensation for other legal remedies provides that no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer and no liability for compensation on the part of such employer shall arise save under the provisions of the Act in respect of such disablement or death. In view of that provision, the court finds that the claimant was entitled to compensation in accordance with the provisions of the Act and the present suit and prayers for compensation for the injuries sustained could not validly be enforced by way of the present action for compensation. Indeed, the Act prescribes offences under which the claimant would be entitled to pursue justice against the respondent if the respondent as an employer failed on any of the obligations under the Act. Thus, the claim and prayer for compensation as prayed for in this suit shall fail but that the claimant is entitled to compensation under the statute.

The **4th issue** for determination is whether the claimant's termination was unfair. RW testified that on 30.06.2014 he convened a meeting and informed all employees that the water project works were being handed over to the client and that all employees would be dismissed on that date. The claimant's account was that the director told him to leave the work place after the doctor prescribed light duty and that he would be recalled but was never recalled. The claimant further testified that the respondent paid him Kshs. 23,000.00 for subsistence pending his recovery and recall but then he was not recalled back at work.

The court finds that the termination in RW's account amounted to redundancy under section 40 of the Employment Act, 2007. The termination, as per the account by both parties, was without notice as provided under section 40 of the Act or section 41 of the Act on termination on account of ill health. The evidence shows that the claimant was paid **Kshs. 23,506.00** being one month pay in lieu of notice and 15 days pay. Thus the court returns that the claimant is not entitled to the one month pay in lieu of the termination notice as prayed for.

The claimant prayed for 12 months' pay for wrongful termination. As the prayer is for wrongful termination and not unfair termination and the claimant was paid in lieu of the termination notice, the prayer will fail. While making the finding, the court has considered that the claimant had served for about 7 months, the payment was on weekly basis and there appears to have been no accruing legitimate expectation that the claimant would continue in employment.

The court has considered the otherwise pending issue about the claimant's injury during work and the manner in which the respondent handled that issue and returns that each party shall bear own costs.

In conclusion judgment is hereby entered for the respondent against the claimant and the statement of claim is dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 27th May, 2016.**

BYRAM ONGAYA

JUDGE